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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-2138

KELVIN J. HURDLE,
Plaintiff – Appellant

Versus

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge.
(CA-01-259-3)

Submitted: December 16.2002
Decided: December 19. 2002
[Entered: December 19, 2002]

Before LUTTIG, MICHEAL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

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and in particular, the due process and equal protection provisions of the United States Constitution, including the rights protected in the Fifth, Seventh Ninth and Fourteenth Amendments.

This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345.

Venue is appropriate in this judicial district under 28 U.S.C. § 1391 (b), because Defendant is a state agency functioning in Richmond, Virginia, and a substantial part of the events giving rise to this Complaint occurred in Richmond, Virginia. Defendant the Department of Environmental Quality is a state agency maintained and funded in significant part by the Commonwealth of Virginia.

STATEMENT OF THE CASE

Hurdle is an African-American male that has made several attempts to obtain an attorney [Appendix 7a]. The one attorney that Hurdle obtained, after over 10 different consultations, worked on the case for 3 weeks and then refunded the total 5,000.00 retainer declaring that the decision for the Federal Complaint case has already been made. Not being able to obtained loyal representation has had a controlling effect on the outcome of this case.

Hurdle was employed by DEQ since 1988, and was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training and Development-Manager ("TD Manager"). Hurdle participated in protected activity from December 1999 through December 2000. On

January 21, 2001 Hurdle was terminated for allegedly not meeting the minimum expectations in any category of his job performance. Hurdle filed an administrative grievance for arbitrary and capricious performance evaluation given in retaliation. Hurdle filed an administrative grievance that took placed May 31 and June 1, 2001. Hurdle filed for the judicial review July 2001. The Department of Environmental Quality ignored and failed to timely respond and submits the grievance records to the State Court. Hurdle then filed his amended complaint in Federal Court August 1, 2001 to pursue his claim of retaliation, hostile work environment and discrimination. In September of 2001, the Federal Court issued an order-instructing Hurdle to pursue the judicial review of the administrative process, upon the motion of DEQ. Motions were filed for summary judgment by DEQ and in opposition to summary judgment by Hurdle. A prima facie case was shown and proven by Hurdle for retaliation, discrimination and a hostile work environment The issues of discrimination or retaliation were not tried in the state court. The preclusive effect given to the judicial review of the grievance hearing is in conflict with Virginia Law and previous cases that have been ruled upon by the United States Supreme Court. Moosavi v. Fairfax County Bd. Of Educ., 666F.2d 58 (1981). Haring v. Prosise, __US__,103 S. Ct. 2368, 76 L.ED.2d 595 (1983). Not having the same consideration or legal conclusions established in the Moosavi v. Fairfax or the Haring v. Prosise case has had a substantial and controlling effect in the out come of this case.

Additionally, neither the discrimination issue nor the hostile work environment issue filed in Hurdle's Federal complaint was ever a part of the administrative grievance that had an administrative judicial review. Therefore, the administrative grievance should not be given preclusive effect, as clearly noted by Virginia Law and as indicated by the previous cases ruled upon by the United States Supreme Court. Allen v. McCurry, 449 U.S at 96, 101 S. Ct at 415-418 n.7 Patsy v. Florida Board of Regents, 457 U.S. 496, 501-502, 512-513,and n.13 102 S.Ct 2557 2560-61,2567, and n.13 73 L.Ed.2d 172 (1982)

REASONS FOR GRANTING THE JUDGMENT FOR PLAINTIFF

The Appropriateness of Defendants' Motion for Summary Judgment. DEQ'S motion for summary judgment is only appropriate if there is no genuine issue as to any material fact, which would entitle defendant to judgment as a matter of law. Fed. R. Civ. P. 56(c). Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact. The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Hurdle since he is the party opposing the motion. Ross, Id., at 364.

Hurdle is entitled to a trial by jury for his Title VII claims of discrimination, hostile environment and retaliation. Hurdle clearly expressed in open argument September 6, 2002 that the hostile work environment, Title VII discrimination, or several of the issues of retaliation or were never apart of the original grievance and therefore not a part of the judicial review

Appendix [10a-12a]. Hurdle requested a jury trial in the filing federal complaint for the Title VII claims. However, by a request motion of the defendant and order of the federal court, Hurdle was required to proceed to the time barred administrative step of judicial review. Additionally, Hurdle Title VII claims under the provisions of the Civil Rights Act of 1964, as amended should not be barred by and 1929 Doctrine of Rooker-Feldman.

Hurdle has been denied the right to a trial by jury for his Title VII claims. The District Court Judge clearly stated in the written order (pg 29a), "Hurdle did not invite Title VII in the Grievance Hearing or in the Circuit Court, but Hurdle did raise there the allegedly retaliatory conduct of which he complains in Count I here." Additionally, as stated by the District Judge, "a hearing officer is empowered to provide remedies only for those issues qualified for a hearing VA, Code § 2.2-3005.C.6. " Discrimination was not an issue that qualified for a hearing. The most favorable of the possible alternative inferences should be drawn in Hurdle's behalf and Judgment rendered in his favor. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

If the most favorable of possible alternative inferences are drawn in Hurdle's behalf, base on the fact that Hurdle did not raise the discrimination issue in the grievance hearing; Hurdle would have survived summary judgment and his case would have gone to trial. Hurdle's constitutional rights to Due Process and Equality under the Law have been denied.

The District Judge also footnoted on page 22a of the order "[1] Defense counsel concedes, and the Grievance Hearing transcript reflects, that Hurdle never explicitly mentioned "racial discrimination" during the hearing."

Congress expressly recognized in both §706 (b) and §706 (c) that a complainant could bring a Title VII suit in federal court despite the conclusion of a state "proceeding." As Justice Blackmun has written in Kremer v. Chem., 456 U.S. 461 (1982), "The Court must acknowledge, see ante, at 470-471, n.8, when Congress referred to state "proceedings", it referred to both state agency proceedings and state judicial [Page 489] review of those agency proceedings". "For a State Court review is merely the last step in the administrative process, the final means of review of the state agency's decision".

The Fourth Circuit had no difficulty distinguishing a state court trial on a discrimination claim from [page 496] state court affirmance of state agency's determination. Moosavi v. Fairfax County Bd of Education. 666 F2d 58 (1981). Unless and issue was actually litigated and determined in a formal judicial proceeding, Virginia law will not treat it as final. See e.g. Luke Construction Co. v. Simpkins, 223 Va. 387, 291 S.E.2d. 204 (1982). Eason v. Felson, 442 U.S. 127, 139, n.10, 99 S. Ct 2205.2213 n.10, 60 L Ed2d 767 (1954) Haring v. Prosise, __U.S. __, 103 S. Ct. 2368, 76 L.ED.2d.

The administrative grievance held at the Department of Environmental Quality (DEQ) should not be given "Full Faith and Credit" and therefore not given

preclusive effect. The Hearing Officer/Commissioner clearly observed and denoted flags of inconsistency in DEQ responses in every direction of questioning, (Def. Encl. X pg. 110 line 14-15). [Appendix 8a] Montana v. United States, 440 U.S. 147 164, n.11, 99 S.Ct 970, 979, n, 11, 59 L.Ed.2d 210 (1979). The hearing officer did not address the respective facts in his opinion and ruled for DEQ despite the inconsistency is DEQ answers of questions. The actions taken by the hearing officer are definitely intervening circumstances that are substantial and had a controlling effect on the outcome of the case. The actions of the hearing officer denied Hurdle a Full Faith and Credit grievance Hearing.

II. Prima Facie Case

Kelvin Hurdle ("Plaintiff") submits the following responses to establish a prima facie case in the respective case.

Harassment Claim

There is no dispute that Hurdle experienced verbal abuse from Howard Freeland (Encl.XXXVII S. Beverly. 336. trans.hearing pg. 28 lines-15-16) (Encl. XXII.pg. 22 line 13-14) He also experienced disparate treatment as clearly described in the denial of access to the job during the audit (Def.Encl.X.Exh. #19.1of 1) and relative to the discussions of Page County groundwater flow (Encl XXXIII) (Encl.X.Exh. #24.10&11of112). Additionally, the reports by Lawrence Farmer relative to the alteration of work documents, more than adequately prove workplace sabotage (Exhibits XVI

and XVII). Verbal abuse, disparate treatment, and workplace sabotage definitely support a harassment claim. (Raniola v Bratton, 2nd Cir, 81 EPD ¶ (40,706). All positive inference of the respective facts is to be viewed in the most favorable light of the Plaintiff and thereby summary judgment should be denied and a trial date set. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

Retaliation Claim

(Def.Encl.X.griev.tr.pg 284 line 6-12) Paylor refuse to cover the performance issues with Hurdle point by point as requested by e-mail (Paylor Depo.Pg.12 lines 1-12) (Paylor exhibit 5) and thereby refuse to do an **independent investigation** of the performance issues. Paylor knew that there were some management issues that needed to be addressed as well as communication problems. (Paylor 336 Depo pg. 30 lines 15-25 and pg. 31 lines 4-6) (Paylor encl. XXII pg.20 lines 4-15).

DEQ management participated in the shell game with respect to the ultimate decision-maker. Such actions infer causation with respect to the ultimate decision-maker in a retaliation case (Willis, 118F.3d at 547). Paylor was assigned the Ultimate decision making responsibilities. Paylor states that he was not the ultimate decision-maker, and that Karen Sismour was. (Paylor Depo 06/02). Proof of such manipulation in decision-making is adequate to show intent to retaliate (Willis, 118F.3d at 547). They all met conversed with Karen Sismour (Def.Encl.X griev hr.tr.pg 284 lines 6-12) and terminated Hurdle because of participation in protected activity. The panel of Treacy, Paylor, Sismour and Romanchik, decided to

terminate Hurdle without any independent investigation. They all acted as the supervisor's cat's paw. Therefore, the innocence of the panel members (Treacy, Paylor, Sismour, and Romanchik) should not spare the agency from liability and thereby establishing a causal link. [Shager v Upjohn Co, 913 F.2d 398, 405 (7th Cir.1990)], (Willis, 118F.3d at 547) and Azzaro v. County of Allegheny, 110 F.3d 968, 973-74 (3d Cir. 1997). These actions would not have occurred against Hurdle if he had not participated in protected activity and therefore the respective retaliatory acts have occurred.

Discrimination

The Defendants defense of unsatisfactory performance is a sham. Discriminatory practices, such as the fraudulent changes of documents, have rendered the record mis-leading and the record itself is a mere pretext for discrimination. Freeland testified that any errors made in 2000 were not worst than the errors made in 1999. (griev. tr.pg. 179 lines 8-20) Hurdle rating in 1999 was meets expectations (1999 Performance Evaluation), but was does not meet the minimum expectations in 2000 even though Hurdle improved and was meeting the four hour time limit expectation. Leslie Romanchick testified that even if Hurdle had excellent quality in his work, he probably wouldn't have received and excellent rating (griev. tr.pg. 110 lines 8-12). She testified that quantity wasn't an issue. Romanchick testified that Hurdle had more than twice the sites than other white employees had with one or two year's experience. (Griev. tr.pg. 90 lines 3-6) (Griev. tr.pg. 96 lines 1-4). The Hearing Officer/Commissioner commented with respect to Ms.

Romanchick's depositional answers that there were contradictory flags in every direction. (Hearing Officer Page 110 lines 14-15). Hurdle was denied the same opportunity granted the whites similarly situated that had seniority. (Hurdle Depo).

Hurdle should have been allowed access to the office as whites similarly situated. The fact that Hurdle was not allowed in the office during the audit, clearly show that Hurdle was treated differently that the whites similarly situated.

CONCLUSION

Hurdle's claim's of retaliation for participating in protected activity, discrimination and hostile work environment has never been litigated Appendix (10a-12a). Virginia law clearly does not give preclusion with respect to constitutional claims that have never been litigated. As footnoted in the Haring v. Posises 103 S.Ct, 2377 (1983). "Although petitioners also contend that a special federal rule of preclusion is necessary to preserve important federal interest, we fail to understand how any such interest justifies the adoption of a rule that would bar the assertions of constitutional claims which have never been litigated".

Hurdle has shown a prima facie case and has demanded a jury trial with respect to his Title VII claims. Hurdle is entitled to have a trial by jury for his Title seven claims.

WHEREFORE, Mr. Hurdle requests that the Court rescinds and amends summary judgment.

CERTIFICATE OF GOOD FAITH

Pursuant to Supreme Court Rule 44.2 the undersigned does hereby certify that the foregoing Petition for Rehearing is restricted to substantial grounds not previously presented in Petitioners' petition for writ of certiorari and is made in good faith and not for delay.

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